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THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

AC ROBIN YOUNGS,

Defendant and Appellant.

A128585

(San Francisco County
Super. Ct. No. 210944)

Following a jury trial, appellant AC Robin Youngs was convicted of misdemeanor possession of burglar tools in addition to vehicle burglary and receiving stolen property. On appeal, he contends the jury instruction defining possession of burglar tools (Pen. Code,¹ § 466) incorrectly described the mental state a defendant must have in order to be convicted of the offense. We agree that it was error to give the challenged instruction but conclude the error was harmless beyond a reasonable doubt. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On October 16, 2009, Alissa Glaser drove her boyfriend's car to work. At approximately 12:30 p.m., she moved the car to a shady spot on the street. Later that afternoon, she saw a man leaning through the car window, which had been broken. She later identified the man as appellant. She saw appellant take a radar detector from the vehicle and walk away. Glaser followed appellant for a couple of blocks and reported his position to police, who arrived and arrested him. A police officer found a radar detector in a

¹ All further statutory references are to the Penal Code unless otherwise specified.

hooded sweatshirt appellant had dropped on the ground immediately before he was detained by police. In addition, spark plug chips were found in appellant's pocket.

A first amended information filed February 11, 2010, charged appellant with felony burglary of a vehicle (§ 459), misdemeanor possession of burglar tools, in particular, spark plug chips (§ 466), and felony receiving stolen property (§ 496, subd. (a)). The information also contained allegations that appellant had a prior strike conviction (§§ 667, subd. (d) & (e), 1170.12, subds. (b) & (c)), and had suffered convictions for seven different felonies for which he had served prison terms (§ 667.5, subd. (b)).

The prosecution's theory of the case was that appellant had entered a car by breaking its window, had porcelain spark plug chips in his possession, and took a radar detector that had been mounted to the vehicle's windshield. An officer who testified at trial explained that porcelain spark plug chips can be used to break car windows. Appellant's trial counsel effectively conceded that appellant had stolen the radar detector from the car but argued there was no evidence he had broken the window. Counsel's theory was that the window was broken in a manner inconsistent with how a window breaks when spark plug chips are used as the means to break glass. Appellant's trial counsel urged that appellant should not be convicted of vehicle burglary but instead was guilty of the lesser included offense of tampering with a vehicle.

The officer who testified about the use of spark plug chips explained that when a spark plug chip is used to break a window the window will shatter into "hundreds if not thousands of little pieces," and he agreed with the assertion that the "[s]hattered pieces will be very, very small pieces." Appellant's trial counsel pointed out that a police photograph showed the affected window was still largely unbroken. The officer agreed that the intact portion of the window covered about 40 percent of the area of the vehicle's front seat, where it had come to rest. When the police officer was cross-examined about whether the broken glass was consistent with the use of a spark plug chip as a means to break auto glass, he responded, "I would say in most cases the glass shatters completely. In some cases, it doesn't. This is obviously one case where it didn't."

The jury returned a verdict of guilty on all counts charged in the information. The parties agreed that appellant would stipulate to two of the prior prison term allegations and that the remaining priors would be stricken.

The court sentenced appellant to serve an aggregate term of five years, composed of the upper term of three years on the vehicle burglary count (§§ 18, 461, subd. (b)) plus two consecutive one-year terms for the prior prison terms (§ 667.5, subd. (b)). The court imposed a concurrent term of 181 days for the misdemeanor conviction for possession of burglar tools. The court also imposed an upper-term sentence of three years for the offense of receiving stolen property but stayed that sentence pursuant to section 654. The court then suspended execution of the sentence, placed appellant on probation for five years, and ordered him to serve two years in a residential drug treatment program. Appellant timely appealed the judgment of conviction.

DISCUSSION

Appellant contends the trial court erred in instructing the jury on the offense of misdemeanor possession of burglar tools. As explained below, although we agree that the trial court erred, the error was harmless beyond a reasonable doubt.

I. The Court Erred in Instructing the Jury on the Offense of Possession of Burglar Tools.

A person who possesses burglar tools under the conditions specified in section 466 is guilty of a misdemeanor. Section 466 states, in relevant part, as follows: “Every person [1] having upon him or her in his or her possession . . . ceramic or porcelain spark plug chips or pieces . . . with intent feloniously to break or enter into any . . . vehicle as defined in the Vehicle Code, *or* [2] who shall knowingly make or alter, or shall attempt to make or alter, any key or other instrument above so that the same will fit or open the lock of a . . . vehicle as defined in the Vehicle Code, without being requested to do so by some person have the right to open the same, *or* [3] who shall make, alter, or repair any instrument or thing, knowing or having reason to believe that it is intended to be used in committing a misdemeanor or felony, is guilty of a misdemeanor.” (Italics added.)

The statute describes three separate criminal acts associated with three separate states of mind necessary to constitute the crime. First, section 466 criminalizes the possession of

one of certain objects, including spark plug chips, “with intent feloniously to break or enter.” Second, the statute makes it a crime “knowingly” to make a key or other lock-defeating device without the permission of a person who has the right to open the lock. Third, the statute prohibits the creation or alteration of any instrument or thing that can be used to facilitate a crime if the defendant “know[s] or [has] reason to believe that it is intended to be used” in committing a crime. (§ 466.)

Thus, the statute makes it a crime to *possess* or *create* burglar tools. In cases of simple possession, the prosecution must prove three elements: “(1) possession by the defendant; (2) of tools within the purview of the statute; (3) with the intent to use the tools for the felonious purposes of breaking or entering. [Citation.]” (*People v. Southard* (2007) 152 Cal.App.4th 1079, 1085.) The offense is a “general intent” crime, meaning that it is not necessary to prove that the defendant specifically intended to use the burglar tools in “ ‘a particular place, or for a special purpose, or in any definite manner.’ ” (*Id.* at p. 1088, citation omitted.) Instead, “ ‘ “[t]he offense is complete when tools . . . [are] procured with intent to use them for a burglarious purpose.” ’ ” (*Ibid.*)

The *creation* of burglar tools, by contrast, requires a mental state different from that associated with simple *possession* of burglar tools. In the case of creating a lock-defeating device, the defendant must “knowingly” create the device without permission from a person entitled to open the lock. (§ 466.) In the case of creating items that may be used to facilitate crimes, the defendant must know or have reason to believe the items will be used in a crime, but there is no requirement that the prosecution must show that the defendant himself or herself intended to use the tools to break or enter. (*Ibid.*)

At trial, the court gave the following instruction to the jury: “Possession of burglary tools: Defendant is charged in Count II with possessing burglary tools. To prove that the defendant is guilty of this crime, defendant [sic] must prove that one, the defendant possessed ceramic or porcelain spark plug chips or pieces; two, when the defendant possessed the ceramic or porcelain spark plug chips, he knew or had reason to believe that the ceramic or porcelain spark plug chips or pieces were intended to break or enter into an automobile; and three, the defendant was not requested to do so by some person having the right to break or enter into that vehicle.”

As is evident, the instruction as given combined the simple act of possession with the mental states associated with creation of lock-defeating devices and other burglar tools. The jury was not instructed that it had to find that appellant intended to use the spark plug chips to break or enter into a vehicle. Instead, based upon the instruction it received, the jury could have convicted appellant on the basis that (1) he was in possession of spark plug chips, (2) he knew or had reason to know the chips could be used to facilitate a crime, and (3) he possessed them without being requested to do so by a person who had the right to break and enter into the vehicle.

The last part of the instruction is nonsensical. The statute does not require the prosecutor to prove that a defendant possessed burglar tools without the permission of a person who had a right to enter the vehicle. More importantly, however, the instruction as given failed to clarify that the jury must find appellant not only possessed the burglar tools but also intended to use them. Instead, the jury could have convicted appellant based upon a finding that (1) he possessed the spark plug chips, and (2) he knew or had reason to know they could be used to commit a crime. However, it is not a crime merely to possess burglar tools with the understanding that they may be used to facilitate a burglary. The evidence must show that the defendant intended to use the burglar tools for the purpose of feloniously breaking or entering.

Here, there was no claim or evidence that appellant created the spark plug chips. Nor did the prosecutor advance a theory that appellant was guilty of possession of burglar tools simply because appellant had reason to know they could be used to break or enter. Accordingly, the court erred in giving the instruction on the offense of possession of burglar tools. The instruction as given failed to identify the mental state required to convict a defendant charged with simple possession—rather than creation—of burglar tools.

II. *The Instructional Error was Harmless Beyond a Reasonable Doubt.*

We now turn to the question of whether the instructional error compels reversal of appellant's conviction for possession of burglar tools. When a court fails to properly instruct the jury on an essential element of an offense, we review the error under the standard announced in *Chapman v. California* (1967) 386 U.S. 18. (*People v. Flood* (1998) 18 Cal.4th 470, 493-494, 502-503.) Under *Chapman*, an appellate court may find the error

harmless if, after conducting a thorough review of the record, the court determines beyond a reasonable doubt that the jury verdict would have been the same absent the error.

(*Chapman v. California, supra*, 386 U.S. at p. 24.)

Appellant argues that the error was prejudicial because “the role of the spark plug chips in breaking the window was highly disputed at trial, and the jury’s verdict did not depend on a determination that appellant actually used the spark plug chip to break the car window.” He contends it is not unreasonable that the jury concluded appellant broke into the car by some means other than the spark plug chips. Appellant’s argument is based upon a misunderstanding of the elements comprising the offense of possession of burglar tools. It is not necessary to demonstrate that a defendant *actually used* particular burglar tools. It is sufficient to show that a defendant possessed burglar tools with the intent to use them, regardless of whether they were actually used. (See *People v. Southard, supra*, 152 Cal.App.4th at p. 1088.)

In this case, there was more than ample evidence that appellant possessed the spark plug chips with intent to use them to break and enter. First, it is undisputed that he possessed spark plug chips. There was no evidence suggesting that spark plug chips have any legitimate purpose—the only evidence at trial with regard to their use was that “auto boosters” use them to break vehicle windows. Further, by finding appellant guilty of vehicle burglary, the jury necessarily rejected the defense theory that appellant simply happened upon a broken window and reached into the vehicle to take a radar detector. Rather, the verdict hinged upon a finding that appellant had broken the window. Regardless of whether appellant broke the window with the spark plug chips or some other way, the fact remains that the jury concluded appellant broke the window and intended to do so. When this fact is combined with the uncontested fact that appellant possessed spark plug chips, a reasonable inference is that appellant had the requisite intent to use the spark plug chips to break into vehicles.

We disagree with appellant’s contention that the evidence is susceptible of a competing inference that appellant did not intend to use the spark plug chips for a felonious purpose. There was no evidence offered that he was carrying the chips for an innocent purpose, nor was there evidence suggesting he was carrying the chips for another person

who intended to use them to break and enter. Further, the prosecutor did not argue that appellant's state of mind was limited to an understanding that the spark plug chips could be used to facilitate a crime. Rather, in closing argument the prosecutor clearly articulated his theory that appellant intended to use the chips: "You got to ask yourself circumstantially for what purpose was the defendant carrying these? For what purpose would he have these on his person? It's not a solid spark plug chip. I don't think it [sic] could infer he's on his way to help somebody repair their automobile." The prosecutor continued, "So for what other purpose based on the testimony that you heard during the trial did the defendant . . . have these on his person? He had these on his person to use to effectuate the breaking into an automobile." Under the circumstances, it is not reasonable to conclude the jury relied upon a theory that was not urged by the prosecutor or supported by the evidence—i.e., that appellant possessed the spark plug chips with knowledge of their purpose but without intent to use them. The record as a whole does not support the competing inference appellant urges.

Moreover, despite appellant's claim that his trial counsel was successful in casting doubt on whether the spark plug chips were actually used to break the window, the evidence is much stronger than appellant suggests. Portions of the window shattered in a pattern that is consistent with the use of spark plug pieces. Nothing else was identified as the instrument used to break the window, and the testifying officer opined that glass doesn't always shatter completely in some cases in which spark plug chips are used. The available evidence strongly supported the inference that spark plug chips were used to break the window.

We conclude the record of the trial, when viewed as a whole, demonstrates beyond a reasonable doubt that the jury verdict would have been the same even if the court had properly instructed the jury that it was required to find that appellant had the intent to use the spark plug chips for the felonious purposes of breaking or entering.

Finally, we observe that appellant's trial counsel effectively conceded at trial that his client was guilty of possessing burglar tools. Appellant contends his counsel never conceded that he was guilty of the crime but instead simply acknowledged that the possession element of the crime was undisputed. To the contrary, while appellant's trial counsel argued there was reasonable doubt as to whether his client was guilty of vehicle

burglary and receiving stolen property, he effectively agreed there was no doubt his client committed the other crimes: “For two of the crimes here, possessing the spark plug chips and auto tampering, there is no doubt that I can see. *And that’s the kind of evidence you convict on.*” (Italics added.) Further, appellant’s trial counsel did not object when the prosecutor stated in his rebuttal that defense counsel conceded that his client had committed the crime of possessing burglar tools. Defense counsel plainly had a tactical reason for this approach—i.e., agreeing that his client was guilty only of misdemeanors but not the more serious felony charges. In light of trial counsel’s tactical decision to concede the charges, we could treat the claim of error as forfeited. (Cf. *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 49.) We need not rest our decision on this ground, however, in light of our conclusion the instructional error was harmless beyond a reasonable doubt.

DISPOSITION

The judgment is affirmed.

McGuiness, P.J.

We concur:

Siggins, J.

Jenkins, J.